Again, the validity and effect of such a divorce may be brought in question in a third state; by what code of law shall it be judged? By that under which it was obtained? But the respondent has never been under the jurisdiction of this code, nor is she now. With equal force it may be urged on behalf of the husband that he cannot be subjected to the law of the wife's domicile, in regard to the divorce elsewhere obtained. As to the law of the forum of the present litigation, it is to be observed that neither of the parties were within the scope of its jurisdiction when the dissolution of the marriage tie took place. Whatever rights were thereby lost or acquired, were so lost or acquired under another sovereignty, nor is it easy to comprehend how the acquirement of domicile within a third sovereignty by one, or even both parties, can in any way alter these rights.

The rights here spoken of, it must be borne in mind, are not those which, attendant on a person's condition as married or single, are established by the law of their residence for the time being, but the right to such condition of married or single, which the person claims to have acquired elsewhere, and to have possessed before he took up his residence in the state where his personal status is now brought in question. Practically, as well as theoretically, this result constantly comes about, that a divorce obtained in one state is held invalid in another, and the distressing confusion thence resulting, the individual suffering and the injury to public morality, are most deplorable. It would be useless to attempt to add anything to what Judge REDFIELD and Lord BROUGHAM have said on this subject. See 3 Am. Law Reg., *supra*, and Story Confl. of L., § 226 c. C. CHAUNCEY.

(*To be continued.*)

RECENT AMERICAN DECISIONS.

Court of Appeals of Kentucky.

GEORGE W. ECKLAR *v.* GALBRAITH ET AL.

A promise to pay a debt discharged by proceedings in bankruptcy is valid and will support an action.

But if it be a conditional promise to pay when able, the plaintiff creditor must show ability as part of his case, and ability to pay means ability after payment of all new debts contracted since the discharge in bankruptcy.

An heir had received advancements from his grandfather, but on the latter's death partition of his real estate was had by legal proceedings, in which no notice

was taken of the advancement. Under the law of Kentucky the heir was not liable to repay the advancement out of the real estate set off to him in the partition, and it could not therefore be treated as a debt in determining his ability to pay his debts.

APPEAL from the Harrison county court.

In 1862 Ecklar recovered a judgment against Galbraith and Lail for $641.31 with interest, an execution upon which judgment was returned "No goods found." On the 20th of March 1869, Lail was discharged by the Bankrupt Court. In October 1869 he promised the plaintiff to pay the debt due to him, which was barred by the discharge; the promise, as alleged in the petition in the present suit, being "that he would pay the plaintiff's debt as soon as he was able, for it was a just and honest debt." The petition further alleged the ability of the defendant Lail. The evidence showed that Lail had sold a tract of land, received from his grandfather's estate, for $6150; that the plaintiff's claim amounted, with interest, to $1128.75, the other debts of the defendant to $4888.81, and the homestead exemption to $1000, making a total of $7017.56. As to one item of the indebtedness, as claimed by the defendant, there was a dispute. The defendant had received advancements from his grandfather over and above his interest in said grandfather's estate; the excess amounting to some $3400. After the death of the grandfather a suit was instituted for the partition of his realty, which resulted in the setting apart to Lail of the land before mentioned; in this suit no mention was made of the excessive advancement, nor did the other heirs claim that the amount should be deducted from the realty assigned to Lail. Subsequently, in an action to settle the rights of the distributees as to the personalty of the decedent, it was found that Lail had received in advancement the sum of $3400 more than his proportion and he was allowed nothing out of the personalty.

A. H. Ward and *Blair & Martin*, for appellants.

J. Q. Ward, for appellee.

The opinion of the court was delivered by

LINDSAY, J.—Ecklar held and owned an unsatisfied judgment against Galbraith & Lail. Galbraith was and is insolvent, and Lail had been discharged from the payment of the debt by a judgment in bankruptcy, rendered by the District Court of the United States for the District of Kentucky.

In his original petition Ecklar states all these facts, and then alleges that, in October 1869, Lail promised and agreed with him that, notwithstanding his discharge in bankruptcy, he would pay to him the sum of money evidenced by the said judgment against Galbraith and himself.

By an amendment to his petition Ecklar stated facts showing that the promise declared on was not an unconditional promise, but a promise to pay the judgment "as soon as he (Lail) was able."

By a second amendment, filed June 27th 1874, Ecklar averred that Lail was then able to make the promised payment.

The promise and all the material allegations of the petition and the amendments were denied by Lail. A trial in the court below resulted in a judgment dismissing Ecklar's petition, and he prosecutes this appeal.

It was necessary, to enable appellant to recover, that he should prove, not only the making of the promise, but the existence of the condition upon which it was to become enforceable. The ability of Lail to pay is the essence of the undertaking, and it must be satisfactorily proved, otherwise no judgment can be rightfully rendered against him: *Mason* v. *Hughart*, 9 B. Monroe 480; *Egbert* v. *McMichael*, Id. 44; *Kingston* v. *Wharton*, 2 S. & R. 208.

When Ecklar proved that Lail held and owned property subject to the payment of debts of value probably sufficient to satisfy his claim, he made out his right, *primâ facie*, to a recovery. But Lail could defeat this apparent right by proving that the payment of debts contracted honestly, and in the ordinary course of his business, subsequent to his discharge in bankruptcy, would exhaust his estate and leave nothing to be applied to the satisfaction of Ecklar's demand.

The promise declared on is a promise to pay when able. It was founded upon a moral obligation, and not upon a valuable consideration received at the time it was made. It cannot be presumed the debtor intended, or the creditor expected, that the rights of persons who had dealt or who might thereafter deal with the late bankrupt in his ordinary business transactions should be subordinated to, or even placed upon terms of equality with, the right secured to Ecklar by the conditional promise upon which he founds his action. The promise must be construed to be an undertaking upon the part of Lail to pay Ecklar out of the first surplus property

he should acquire, and there can be no surplus until he satisfies the claims of those who have extended him credit upon the faith of his non-liability to pay the debts from which he was discharged by the judgment in bankruptcy.

But the court below erred in treating the excess of advancements received by Lail from the estate of his grandfather, Joseph Shawon, deceased, as a debt due from him to the distributees or personal representatives of the decedent. His co-heirs had the right, before the partition of the real estate descending from their common ancestor, to have the matter of advancements inquired into, and their respective rights in that regard adjusted. But they did not see proper to do so. In an action in equity, to which they were all parties, one hundred and twenty-three acres of land were set apart and conveyed to this appellee. No lien was retained to secure the repayment of advancements made by the ancestor to him, and no claim asserted against him on that account. He took a free and unencumbered title to his land, and the judgment under which he holds remains to this day in full force and effect.

Subsequently, in an action to settle the rights of the distributees as to the personal estate of the decedent, it was found that appellee had received advancements to the amount of $3400 more than his proportion, and therefore he was allowed nothing out of the personalty. But the court did not pretend to adjudge that he should refund this excess. The distributees and the personal representatives appreciated the fact that he was under no legal obligation to refund and sought no judgment against him. As before stated, they might have compelled him to account for this excess in the action in which the real estate was portioned, by insisting that he should receive no part of the realty until they were each and all made proportionately equal with him, but they did not choose to exercise that right. They are now all bound by the judgment of partition, and have no claim against appellee on account of advancements.

It was, therefore, error upon the part of the court below to allow proof of this supposed claim to go to the jury; and also error to instruct them that they should include it in the estimate they were to make as to the amount of appellee's indebtedness.

As appellant declined to submit to a general continuance, the court did not err in refusing to allow him to file an amended petition after the testimony had all been heard. The amended petition

would have worked a material change in one of the issues of fact upon which the parties went to trial.

For the errors stated, the judgment is reversed, and the cause remanded for a new trial upon principles not inconsistent with this opinion.

The question as to what is a sufficient promise to pay a debt barred by a discharge in bankruptcy has sometimes been regarded as one with the question what is a sufficient promise or acknowledgment to take a debt out of the Statute of Limitations. There is however an important difference between the characters of the two bars, viz.: The Statute of Limitations affects merely the remedy, while the discharge in bankruptcy is a discharge of the debt itself, at least legally speaking, and, therefore, the analogy of many of the cases which tend to shake the force of the statute, should be very sparingly applied to cases in which it is sought to remove the bar of a discharge. It is easy to see more than a technical reason for the distinction. In the case of a discharge the ruined man has made, theoretically, at least, all the payment in his power; he has surrendered his entire property and it has been divided amongst his creditors, who have had every opportunity to examine into his conduct and ascertain whether or not it has been tainted with fraud, and if it has the discharge is refused; whereas in a plea of the statute, the debtor usually relies at most upon the negligence of his creditor and sometimes is taking advantage of his forbearance. The fluctuations of the decisions with reference to the statute need not, therefore, be considered in regarding the first question raised by the principal case.

In the first place there can be no doubt that a promise to pay a debt barred by a discharge in bankruptcy is a valid promise, and the moral obligation resting upon every man to pay his just debts, no matter how protected by the law against their payment, is a sufficient consideration to support a promise.

In *Kingston* v. *Wharton*, 2 S. & R. 208 (1816), TILGHMAN, C. J., said: "It was once doubted whether a new promise by a bankrupt after obtaining his certificate was binding, but it has been long settled that it is binding, because the *moral* obligation to pay continues, notwithstanding the discharge, and that obligation is a sufficient consideration for a new promise."

In *Wait* v. *Morris*, 6 Wend. 394 (1831), SAVAGE, C. J., said: "In the case of a debt barred by a discharge, the demand is extinguished in law, though it still exists in equity and good conscience, and as Lord MANSFIELD said in *Turman* v. *Fenton*, 'there is no honest man who does not discharge them if he afterwards has it in his power to do so. Though all legal remedy may be gone the debts are clearly not extinguished in conscience.' But the legal demand being extinct it cannot be enforced unless revived or renewed by a new promise. * * * There must be a promise for which the old debt is a sufficient consideration."

In *Briggs & Ely* v. *Sutton*, Spencer's Rep. 581 (N. J. 1846), CARPENTER, J., remarked: "Not the weight only but the whole current of authority sustains the consideration of an express promise by a bankrupt to pay a prior debt from which he has been discharged by bankruptcy when the promise has been distinct and unequivocal."

The current of authority is that suit must be brought upon the new promise, although in a case in Massachusetts, *Maxun* v. *Morse*, 8 Mass. 127 (1811),

an action on the original promise was sustained; yet see contra *Field's Estate*, 2 Rawle 351 (1830); *Egbert* v. *McMichael*, 9 B. Mon. 44 (1848); and it is to be noticed that in the Massachusetts case the objection was not made until after verdict.

The right of recovery resting upon a new promise by the debtor, it follows that to give an unconditional right there must be an absolute and unconditional promise; a mere recognition of a moral liability does not suffice; and it also follows, that the debtor may annex to his promise to pay the barred debt such conditions as he may see fit; which conditions must be fulfilled and proved, and as the fulfilment is a condition precedent to recovery it must be averred in the declaration.

The rule is well stated by STORY, J., in *Bell* v. *Morrison*, 1 Peters 351. "If the bar is sought to be removed by the proof of a new promise, that promise as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate, and if any conditions are annexed they ought to be shown to be performed."

In *Stewart* v. *Reckless*, 4 Zab. 427 (1854), POTTS, J., said: "The expression of an intention to do a thing is not a *promise* to do it," and held the doctrine before set forth.

In *Staunton* v. *Brown*, 6 Dana 248 (1838), the promise was to pay in seven years "provided he is then able to do so without depriving himself and family of the means of support;" it was held that the *narr.* must aver ability.

In *Sconton* v. *Eislord*, 7 Johns. 36 (1810), where the promise was "provided he could pay him without distressing his family," the court said: "It has been repeatedly held that a promise to pay, when able, a debt barred by the Statute of Limitations, or by a certificate under the bankrupt law, was not an absolute but a conditional promise, and it lay with the plaintiff to prove the defendant able."

In *Kingston* v. *Wharton* (*supra*), YEATES, J., said: The cases cited on the argument fully show that a promise to pay when able is a contingent debt and not absolute, until the happening of the event. Ability must be ascertained by the proper proof."

In *Mason* v. *Hughart*, 9 B. Mon. 480 (1849), the promise was to pay when able and ability was averred. GRAHAM, J., said: "It is a promise dependent upon a very uncertain contingency which may never occur, yet it is one which has been enforced. * * * The ability to pay ought to be clearly proven. The mere opinion of witness that a party had means sufficient wherewith to discharge the debt ought not to be regarded as sufficient evidence. The jury should be fully satisfied, by *facts* proved to exist, that the debtor has property and means which enable him to pay. They ought not to be satisfied to make experiments on doubtful proof and by rendering a verdict for plaintiff again reduce a struggling debtor to hopeless insolvency, leaving the judgment unsatisfied."

This brings us to the consideration of the meaning attached to ability, by the learned judge in the principal case. He held that that word meant ability on the part of the debtor to pay, after discharging the indebtedness contracted subsequently to his discharge in bankruptcy, and that the promise did not put the holder of the revived claim on a level with creditors whose claims had accrued subsequently to the discharge. This seems to us only a fair and just interpretation of the promise. Persons contracting with a discharged bankrupt have a right to think that they are dealing with a new man, unburdened by the weight of his past debts, and that whatever property he has then is primarily liable to them. Indeed it would seriously affect the value of a discharge, if

this trust and faith therein, as an obliterator of old debts, were to be swept away by the knowledge that, whenever a conscientious person discharged in bankruptcy, should promise to pay a former creditor when able, the first property obtained by the debtor would be liable to be seized by the creditor, while the subsequent creditors would be left with no fund for the payment of their equally meritorious claims. As remarked by GIBSON, C. J., in *Field's Estate* (*supra*), "A promise to pay an antecedent debt would be a positive breach of faith to those who had given credit on the foot of the certificate." The remark was a mere dictum and not necessary to the decision of the case, which merely affected the right of the revived debt in question to rank as a specialty, and the present case is the first, so far as we have been able to discover, in which the doctrine has been authoritatively announced, but its justice and good sense seem to us striking.

As to the second part of the opinion, the statute of Kentucky bearing on the subject is as follows, viz. :—

"Any real or personal property or money, given or devised by a parent or grandparent to a descendant, shall be charged to the descendant or those claiming through him to the division and distribution of the undevised estate of the parent or grandparent, and such party shall receive nothing further therefrom until the other descendants are made proportionately equal with him, according to his descendible and distributable share of the whole estate, real and personal, devised and undevised;" 1 Staunton Rev. St., ch. 30, § 17, p. 436.

We are unable to see anything in this statute contrary to the well-established principle that an advancement is not recoverable, nor do we see that the fact that the heirs, for whose benefit the statute was made, had neglected to take advantage of its provision when they might have done so in the proceedings in partition, alters the case; the statute gives no action; it merely gives, so to speak, a right of retainer, which, like all other rights, must be taken advantage of in the proper way and at the proper time.

H. BUDD, JR.

Supreme Court of the United States.

EX PARTE R. S. PARKS.

Where an inferior court has jurisdiction of the cause and the person in a criminal suit, and no writ of error lies to the Supreme Court, the latter will not review the legality of the proceedings on *habeas corpus*.

It is only where the proceedings below are entirely void, either for want of jurisdiction or other cause, that such relief will be given.

Whether a matter for which a defendant is indicted in the District Court is or is not a crime by the laws of the United States, is a question which that court must decide, and is within its jurisdiction. This court will not review its decision by *habeas corpus*.

The cases of *Yeager*, 8 Wall. 85, and *Lange*, 18 Wall. 163, referred to and approved.

PETITION for *habeas corpus*. The petitioner was convicted of forgery in the District Court of the United States for the Western District of Virginia, and was in custody by virtue of a commitment under sentence of imprisonment in the penitentiary for said offence.